

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RICHARD DENT, J.D. HILL, JAMES
MCMAHON, JEREMY NEWBERRY,
RON PRITCHARD, RON STONE, KEITH
VAN HORNE, AND MARCELLUS
WILEY,

No. C 14-02324 WHA

Plaintiffs,

**ORDER DENYING CLASS
CERTIFICATION**

v.

NATIONAL FOOTBALL LEAGUE,

Defendant.

INTRODUCTION

This case has seen seven years of litigation, three motions to dismiss, two trips to our court of appeals, and now a motion for class certification. Plaintiffs move to certify a nationwide class of former professional football players who played for 32 different teams across 23 different states over a period of 35 years asserting a common law claim of negligent voluntary undertaking for failure to ensure the proper recordkeeping, administration and distribution of pain killers and other prescription drugs used in professional football. For the following reasons, the motion is **DENIED**.

STATEMENT

Defendant National Football League is an unincorporated association of 32 separately-owned and independently-operated professional football “clubs” or teams. “The NFL promotes, organizes, and regulates professional football in the United States, but it does not employ individual football players; they are employees of the teams for whom they play.” *Dent v. National Football League*, 902 F.3d 1109, 1114 (9th Cir. 2018) (cleaned up) (*Dent I*).

“Since 1968, the NFL, its member teams, and NFL players have been bound by a series of CBAs [collective bargaining agreements] negotiated by the NFL Players’ Association (the players’ bargaining unit) and the NFL Management Council (the teams’ bargaining unit). Since 1982, the CBAs have included provisions regarding ‘players’ rights to medical care and treatment.’ Those provisions have changed somewhat over the years, but generally speaking, they have required teams to employ board-certified orthopedic surgeons and trainers who are certified by the National Athletic Trainers Association, and they have guaranteed players the right to access their medical records, obtain second opinions, and choose their own surgeons. The CBAs imposed certain disclosure requirements on team doctors; for example, the 1982 CBA established that ‘if a Club physician advised a coach or other Club representative of a player’s physical condition which could adversely affect the player’s performance or health, the physician would also advise the player.’ The 1993 CBA added the requirement that ‘if such condition could be significantly aggravated by continued performance, the physician would advise the player of such fact in writing.’” *Dent I*, 902 F.3d at 1114 (footnotes omitted).

1. DENT I.

Plaintiffs Richard Dent, Jeremy Newberry, J.D. Hill, Keith Van Horne, Ron Stone, Ron Pritchard, James McMahon, and Marcellus Wiley are retired NFL players who played for many different NFL teams from 1969 to 2008.

Plaintiffs filed this action in May 2014 on behalf of a putative nationwide class of all retired NFL players. Before the NFL filed an answer, plaintiffs followed up with a first, then second, amended complaint. At all material times, plaintiffs have alleged that the NFL has maintained a “return to play business plan,” pursuant to which players are pressured to perform

1 at their highest possible competitive levels, including by prematurely returning to play after a
2 severe injury. Plaintiffs allege that the NFL and the clubs pressured them to prematurely return
3 to play in the face of frequent, painful injuries by providing them with excessive amounts of
4 addictive opioid pain killers, like Vicodin, Percodan, and Percocet, and non-steroidal anti-
5 inflammatory drugs (NSAIDs), like Toradol. In addition, plaintiffs have alleged that club
6 doctors and trainers gave them the drugs without written prescriptions, in unlabeled manila
7 envelopes, and without proper warnings about risks of side effects, including long-term risks of
8 excessive use.

9 The second amended complaint asserted state common law claims for relief, including
10 fraud, concealment, misrepresentation, and negligence *per se* predicated in part on the NFL's
11 alleged provision and administration of controlled substances without written prescriptions,
12 proper labeling, or disclosures in violation of the Controlled Substances Act, 21 U.S.C. § 801
13 *et seq.*

14 A December 2014 order dismissed the second amended complaint in its entirety (Dkt No.
15 106). The order found that Section 301 of the Labor Management Relations Act preempted the
16 state common law claims because assessing what duty the NFL owed the players to protect
17 them from medication abuse by the clubs, and whether the NFL breached that duty, would
18 require interpretation of the CBAs. Specifically, the order stated (*id.* at 12):

19 In determining the extent to which the NFL was negligent in
20 failing to curb medication abuse by the clubs, it would be essential
21 to take into account the affirmative steps the NFL has taken to
22 protect the health and safety of the players, including the
23 administration of medicine. The NFL addressed the problem of
24 adequate medical care for players in at least one important and
25 effective way, *i.e.*, through a bargaining process that imposed
26 uniform duties on all clubs — without diminution at the whim of
27 individual state tort laws. Therefore, the NFL should at least be
28 given credit, in any negligence equation, for the positive steps it
has taken and imposed on the clubs via collective bargaining.

1 Our court of appeals reversed in *Dent I*. Our court of appeals focused on the allegations
 2 that the NFL *itself* had distributed and administered drugs in violation of potentially applicable
 3 statutes:

4 Each team hires doctors and trainers who attend to players’
 5 medical needs. Those individuals are employees of the teams, not
 6 the NFL. But the players’ Second Amended Complaint (SAC)
 7 asserts that the NFL itself directly provided medical care and
 8 supplied drugs to players. For example, the SAC alleges that:

- 9 • “The NFL directly and indirectly supplied players with
 10 and encouraged players to use opioids to manage pain
 11 before, during and after games in a manner the NFL
 12 knew or should have known constituted a misuse of the
 13 medications and violated Federal drug laws.”
- 14 • “The NFL directly and indirectly administered Toradol
 15 on game days to injured players to mask their pain.”
- 16 • “The NFL directly and indirectly supplied players with
 17 NSAIDs, and otherwise encouraged players to rely
 18 upon NSAIDs, to manage pain without regard to the
 19 players’ medical history”
- 20 • “The NFL directly and indirectly supplied players with
 21 local anesthetic medications to mask pain and other
 22 symptoms stemming from musculoskeletal injury when
 23 the NFL knew that doing so constituted a dangerous
 24 misuse of such medications.”
- 25 • “NFL doctors and trainers gave players medications
 26 without telling them what they were taking or the
 27 possible side effects and without proper recordkeeping.
 28”
- “Medications are controlled by the NFL Security Office
 in New York”

* * *

22 The players argue that they were injured by the NFL’s
 23 “provision and administration” of controlled substances without
 24 written prescriptions, proper labeling, or warnings regarding side
 25 effects and long-term risks, and that this conduct violated the
 26 Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Food,
 27 Drugs, and Cosmetics Act, 21 U.S.C. § 301 *et seq.*; and the
 28 California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000 *et seq.*

The district court believed that the “essence” of the
 plaintiffs’ negligence claim “is that the individual clubs mistreated
 their players and the league was negligent in failing to intervene
 and stop their alleged mistreatment.” However, as we read the
 complaint, the plaintiffs are not merely alleging that the NFL failed

1 to prevent medication abuse by the teams, but that the NFL *itself*
2 illegally distributed controlled substances, and therefore its actions
3 directly injured players. The SAC alleges that the NFL “directly
4 and indirectly supplied players” with drugs. It also alleges that the
5 NFL implemented a “League-wide policy” regarding Toradol, that
6 “medications are controlled by the NFL Security Office in New
7 York,” that “the NFL coordinated the illegal distribution of
8 painkillers and anti-inflammatories for decades,” and that “NFL
9 doctors and trainers” gave players medications “without telling
10 them what they were taking or the possible side effects.”

11 902 F.3d at 1115, 1118 (footnote omitted). A footnote to the latter paragraph stated: “The
12 NFL argues that the doctors and trainers who actually provided medications to players were
13 employees of the teams, not the NFL. But at this stage of the litigation, we must take the
14 allegations in the SAC as true.” *Id.* at 1118, n.5.

15 This reading of the second amended complaint drove our court of appeals’ analysis.
16 “With that reading of the complaint in mind,” our court of appeals stated, “to the extent the
17 NFL is involved in the distribution of controlled substances, it has a duty to conduct such
18 activities with reasonable care” and that “when it comes to distribution of potentially
19 dangerous drugs, minimum standards are established by statute,” such as the Controlled
20 Substances Act and Food, Drug, and Cosmetics Act. *Id.* at 1118–19. To the extent the NFL
21 violated those laws, our court of appeals held, adjudicating plaintiffs’ claims did not require
22 interpretation of the CBAs:

23 [T]he district court noted that the CBAs place medical disclosure
24 obligations “squarely on Club physicians, not on the NFL.” But
25 the *teams’* obligations under the CBAs are irrelevant to the
26 question of whether the *NFL* breached an obligation to players by
27 violating the law. The parties to a CBA cannot bargain for what is
28 illegal. *Allis-Chalmers [Corp. v. Lueck]*, 471 U.S. 202, 212
(1985); *see also Cramer [v. Consolidated Freightways, Inc.]*, 255
F.3d 683, 695 (9th Cir. 2001).

Id. at 1121.

29 *Dent I* held “only that the plaintiffs’ negligence claim regarding the NFL’s alleged
30 violation of federal and state laws governing controlled substances [was] not preempted by
31 § 301.” *Ibid.* *Dent I* reversed and remanded for a determination whether the negligence claim
32 was sufficiently pled.

2. ***EVANS V. ARIZONA CARDINALS FOOTBALL, LLC.***

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Meanwhile, in 2015, after plaintiffs had filed the first notice of appeal in *Dent*, a different group of retired NFL players (and the widow of one), represented by the same counsel, filed a class action complaint on behalf of the same putative class with virtually identical allegations this time against each of the clubs in federal court in Maryland. Compl., *Evans et al. v. Arizona Cardinals Football Club, LLC, et al.* (No. WMN-15-1457) (Dist. of Md., May 21, 2015) (Judge William M. Nickerson). Judge Nickerson transferred *Evans* to this district under 28 U.S.C. Section 1404, finding that the transfer would serve judicial economy because *Evans* could be assigned to the undersigned judge as a case related to *Dent*. *Evans v. Arizona Cardinals Football, LLC*, 2016 WL 759208 (Dist. of Md., Feb. 25, 2016) (Judge William N. Nickerson). Upon arrival here, an order assigned *Evans* to the undersigned judge as related to *Dent* under Civil Local Rule 3-12.

The complaint asserted claims for intentional misrepresentation and “civil conspiracy.” The teams moved to dismiss the complaint on the grounds that Section 301 of the Labor Management Relations Act preempted the claims and that the claims were time-barred by the statute of limitations. A July 2016 order denied the motion. As for preemption, the order distinguished the *Dent* claims as grounded in the NFL’s negligent failure to intervene to protect the players from the clubs’ excessive dispensation of drugs thereby implicating the affirmative steps taken by the NFL in the form of the CBA provisions on that topic. In contrast, the claims against the clubs alleged intentional conduct that violated, *inter alia*, the Controlled Substances Act and, therefore, the claims fell within the illegality exception to Section 301 preemption as described in *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d, 683 (9th Cir. 2001) (en banc). As for the statute of limitations, the July 2016 order rejected the argument without prejudice.

A November 2016 order granted the *Evans* plaintiffs leave to file a first amended complaint adding claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962, 1964, and for concealment, in addition to previously asserted claims for intentional misrepresentation and “civil conspiracy.”

1 In February 2017, an order dismissed the RICO claims with prejudice, finding that the
2 four-year statute of limitations for civil RICO claims barred the *Evans* plaintiffs' RICO claims.
3 To establish a civil RICO claim, a plaintiff had to show injury to business or property. 18
4 U.S.C. § 1964(c). In an attempt to satisfy that requirement, the *Evans* plaintiffs alleged that the
5 clubs' distribution of excessive medications cut their NFL careers short and diminished their
6 post-NFL employment prospects. The four-year limitations period for a civil RICO claim
7 began to run when the plaintiffs knew or should have known of their underlying injury.
8 *Rotella v. Wood*, 528 U.S. 549, 553–55 (2000); *Pincay v. Andrews*, 238 F.3d 1106, 1109 (9th
9 Cir. 2001). The *Evans* plaintiffs who asserted RICO claims had all retired from the NFL by
10 2004 (at the latest), at which point they had constructive knowledge of their underlying
11 injuries; therefore, the statute of limitations barred them from asserting RICO claims more than
12 a decade later.

13 Two subsequent orders granted summary judgment on the remaining claims based on the
14 statute of limitations and the exclusive remedy rule of the workers' compensation statutes of
15 the remaining plaintiffs' resident states. Final judgment entered in *Evans* in July 2017. Our
16 court of appeals affirmed. *Evans v. Arizona Cardinals Football Club, LLC*, 761 Fed. App'x
17 701 (9th Cir. 2019).

18 **3. DENT II.**

19 On remand from our court of appeals in *Dent I*, plaintiffs were given leave to file their
20 best and final complaint. Plaintiffs filed a third amended complaint (the operative complaint),
21 abandoning their other theories of liability leaving only a common law negligence claim. In
22 addition to a negligence *per se* theory previously asserted, plaintiffs proffered two additional
23 theories of negligence: special relationship, and negligent voluntary undertaking.

24 An April 2019 order dismissed the complaint entirely for failure to state a claim (Dkt No.
25 135). As for negligence *per se*, the order found that the third amended complaint did not
26 sufficiently allege that the NFL *itself* had violated the statutes governing distribution and
27 administration of controlled substances (*id.* at 8–9):
28

1 Significantly, plaintiffs do not make any specific, plausible
2 allegation that the relevant statutes apply to the NFL, let alone that
3 the NFL violated those statutes. . . . [N]owhere in the third
4 amended complaint do plaintiffs allege, as they previously pitched
5 before our court of appeals, that the NFL undertook to provide
6 direct medical care and treatment to players such that its conduct
7 violated any relevant drug laws. Though plaintiffs generally
8 contend that the NFL controlled and directed the distribution of the
9 players' medication via the "Business Plan," nowhere in the third
10 amended complaint do plaintiffs specifically allege any facts as to
11 how the NFL instructed the club doctors' handling, distribution,
12 and administration of the drugs or otherwise forced the club
13 doctors to violate any relevant drug laws.

14 The April 2019 order further found that the third amended complaint failed to plausibly allege
15 a negligent voluntary undertaking theory because the complaint had "not specifically alleged
16 how the NFL's conduct *increased* the risk of harm to plaintiffs" (*id.* at 13).

17 Plaintiffs appealed again. *Dent v. National Football League*, 968 F.3d 1126 (9th Cir.
18 2020) (*Dent II*). Importantly, in *Dent II*, plaintiffs did an about face, disavowing the assertion
19 that had carried the day in *Dent I*. Namely, in *Dent I*, our court of appeals had relied on the
20 allegations that the *NFL itself*, as opposed to the clubs, had distributed the drugs to the players.
21 *Dent I*, 902 F.3d at 1118. But at oral argument in *Dent II*,

22 Plaintiffs' counsel acknowledged that the phrase "NFL doctors and
23 trainers," as used in the [third amended complaint], does not
24 actually refer to any employees of the NFL itself. Despite the
25 [third amended complaint's] references to "Club doctors and
26 trainers," Plaintiffs' counsel conceded that the "NFL" and "Club"
27 doctors and trainers are one and the same, and are in fact the hired
28 hands of the Clubs.

29 *Dent II*, 968 F.3d at 1131. That concession doomed plaintiffs' negligence *per se* theory. *Dent*
30 *II* also affirmed dismissal of the special relationship theory of negligence.

31 Our court of appeals reversed, however, dismissal of the negligent voluntary undertaking
32 theory. As *Dent II* noted, California follows the theory of liability to third persons for physical
33 harm caused when, under certain circumstances, one negligently performs a voluntary
34 undertaking to another, as articulated by Section 324A of the Restatement (Second) of Torts.
35 *Dent II*, at 1132 (citing *Artiglio v. Corning Inc.*, 18 Cal. 4th 604 (1998)). *Dent II* held that
36 plaintiffs had sufficiently pled such a theory under the following elements:

37 (1) The defendant undertook to render services to another; (2) of a
38 kind the defendant should have recognized as necessary for the

1 protection of the plaintiff; (3) the defendant failed to exercise
 2 reasonable care in the performance of the undertaking; (4) the
 3 failure resulted in physical harm to the plaintiff; and (5) the
 4 defendant's carelessness increased the risk of such harm.

5 *Ibid.* (cleaned up).

6 *Dent II* held that the allegations of the NFL's voluntary undertaking resembled *Mayall ex*
 7 *rel. H.C. v. USA Water Polo, Inc.*, 909 F.3d 1055 (9th Cir. 2018). *Mayall* held that a claim
 8 based on a theory of voluntary undertaking survived a motion to dismiss where the complaint
 9 alleged that, "by failing to establish a concussion-management and return-to-play protocol for
 10 its youth water polo league, USA Water Polo had failed to exercise reasonable care in the
 11 performance of its undertaking—ensuring a healthy and safe environment for its players."
 12 *Mayall*, 909 F.3d at 1067. Quoting from the operative complaint, *Dent II* stated:

13 Similarly, the [third amended complaint] alleges that the
 14 NFL "voluntarily undertook a duty" to "ensure the proper
 15 recordkeeping, administration and distribution of medications," but
 16 ultimately failed due to its "business culture in which everyone's
 17 financial interest depends on supplying medications to keep
 18 players in the game." Plaintiffs support this statement with factual
 19 allegations that the NFL created a drug oversight program in 1973,
 20 which "required teams and their doctors to report to the NFL
 21 regarding the administration of medications." Beginning in at least
 22 the early 1990s, the NFL allegedly "began auditing clubs'
 23 compliance with federal drug laws," such as "the types of drugs
 24 being administered, the amounts in which they were administered,"
 25 and related information. Plaintiffs also claim that the NFL has
 26 "mandated procedures to control the drug distribution system,"
 27 including the registration of the Clubs' facilities as storage
 28 facilities for controlled substances, the use of tracking software by
 SportPharm, and periodic drug-use audits by the NFL Security
 Office. NFL Club trainers and doctors are supposedly "mandated
 by the NFL to meet on a yearly basis" with NFL officials, and
 doctors provide "reports directly to the League about the
 medications." The NFL also purportedly funded studies on
 Toradol use, which resulted in Toradol guidelines that were not
 followed.

* * *

The NFL has promulgated rules such as the "NFL
 Prescription Drug Program and Protocol," with the purpose (as that
 document allegedly states) of "providing guidelines for the
 utilization of all prescription drugs provided to players and team
 personnel by physicians and other healthcare providers and
 associated NFL clubs" and "to ensure appropriate handling" . . . in
 compliance with "regulations of the Federal Drug Enforcement
 Administration (DEA) as they apply to controlled substances." . . .

1 . . . [The third amended complaint] paints a picture of the
 2 NFL’s “mandated” and “required” audits, oversight, and
 3 procedures regarding drug distribution across member Clubs, as
 4 well as the NFL’s failure to enforce rules that it knows are
 5 necessary to avoid further injury to players. These allegations
 6 support Plaintiffs’ theory that the NFL undertook “the duty of
 7 overseeing the administration” of the distribution of pain
 8 medications to players and is aware that it should be providing
 9 protections.

10 *Id.* at 1132–34.

11 *Dent II* remanded the negligent voluntary undertaking claim, instructing the district court
 12 to “examine afresh whether the NFL’s general disclaimer of liability for individual players’
 13 medical treatment is relevant to the sufficiently pled allegations of the organizations’ inaction,
 14 where audit results demonstrate failure to safely distribute pain killers” *Id.* at 1136.

15 Upon remand, a February 2021 order denied the NFL’s second motion to dismiss based
 16 on Section 301 preemption (Dkt. No. 154). That order first found that the 2011 CBA
 17 contained the NFL’s general disclaimer of liability alluded to by *Dent II* but no prior CBAs
 18 contained such a disclaimer. The parties agreed that because no named plaintiff played after
 19 2008, the 2011 CBA did not apply.

20 As for preemption based on the earlier CBAs, the February 2021 order explained (*id.* at
 21 10–11):

22 While the NFL says that the “core” injury plaintiffs allege
 23 arises out of their premature “return-to-play” — an issue the CBAs
 24 cover — other injuries, such as the harmful and long-term side
 25 effects from over-administration of prescription medications, are
 26 also implicated. And, unlike “return-to-play,” the proper
 27 administration and distribution of medications is not a subject the
 28 CBAs explicitly cover. Counsel for plaintiffs insist they can prove
 the voluntary undertaking claim without reference to any of the
 CBAs, such as through voluntary programs that the NFL allegedly
 imposed on the individual clubs. To illustrate the viability of their
 proposed method of proof, there will need to be a matching of each
 such undertaking against the CBAs to assess the extent to which
 interpretations of the CBAs are intertwined with the voluntary
 programs.

Another problem is whether the plaintiffs’ proof and theory
 will be that the undertaking itself was negligently carried out, as
 opposed to whether the NFL failed to intervene and stop the clubs’
 alleged abuses of controlled substances in the face of receiving
 information to that effect. For example, plaintiffs point to the
 NFL’s audits of the clubs’ use of prescription drugs, which
 allegedly showed or should have showed that the clubs were

1 supplying copious amounts of painkillers to players. Now, if the
2 theory is that the audits themselves were negligently conducted
3 (such that they failed to reveal the true extent of the problem), then
4 little or no interpretation of any CBA will be required. On the
5 other hand, if the theory is that the audits showed rampant misuse
6 of painkillers by the clubs and that the NFL's failure to intervene
7 constituted negligence, then in evaluating whether the NFL failed
8 to do enough, we will need to look at what the NFL committed to
9 do on that subject (if anything) in the CBAs. And, we will need to
10 evaluate the extent to which the terms of any CBA need to be
11 "interpreted."

12 Plaintiffs now seek to certify the following class:

13 All NFL players who played in the National Football League at
14 any time between January 1, 1973 and December 31, 2008, and
15 who received Medications from an NFL club, including, but not
16 limited to, opioids (such as Vicodin, Percocet, Percodan,
17 Hydrocodone, etc.), non-steroidal anti-inflammatory drugs (such as
18 Toradol, Vioxx, Naprosyn, Indocin, Celebrex, etc.), corticosteroids
19 (such as Prednisone), or local anesthetics (such as Lidocaine,
20 Xylocaine, etc.).

21 This order follows full briefing and a hearing.

22 ANALYSIS

23 Certification of a class action is governed by Federal Rule of Civil Procedure 23.

24 Plaintiffs must show that the proposed class action satisfies each of the four prerequisites of
25 Rule 23(a) and one of the three requirements of Rule 23(b). Rule 23(a) requires plaintiffs to
26 show:

- 27 (1) the class is so numerous that joinder of all members is
28 impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of
the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the
interests of the class.

Plaintiffs seek certification under Rule 23(b)(3), which requires them to show that:

the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

1 A district court must do a rigorous analysis to determine if the requirements of Rule 23
2 are satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). “Frequently that
3 rigorous analysis will entail some overlap with the merits of the plaintiff’s underlying claim.
4 That cannot be helped. The class determination generally involves considerations that are
5 enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” *Id.* at 351
6 (cleaned up).

7 **1. PLAINTIFFS’ THEORY OF LIABILITY AFTER *DENT I* AND *DENT II*.**

8 The briefing and hearing on the instant motion have revealed that, despite two opinions
9 from our court of appeals on the subject, the precise nature of plaintiffs’ theory of the NFL’s
10 liability remains elusive.

11 As noted, in *Dent I*, our court of appeals held that Section 301 of the LMRA did not
12 preempt plaintiffs’ claims against the NFL “to the extent the NFL is involved in the
13 distribution of controlled substances” and to the extent the NFL’s conduct in such distribution
14 violated relevant statutes, in particular the Controlled Substances Act. *Dent I*, 902 F.3d at
15 1119. *Dent I* repeatedly emphasized plaintiffs’ allegations that the “NFL *itself* illegally
16 distributed controlled substances, and therefore its actions directly injured players.” 902 F.3d
17 at 1118.

18 In their second appearance before our court of appeals, plaintiffs admitted those
19 allegations were incorrect; the NFL did not distribute or administer medications to the players,
20 only club physicians and trainers did so:

21 Plaintiffs’ counsel acknowledged that the phrase “NFL doctors and
22 trainers,” as used in the [third amended complaint], does not
23 actually refer to any employees of the NFL itself. Despite the
24 [third amended complaint’s] separate references to “Club doctors
25 and trainers,” Plaintiffs’ counsel conceded that the “NFL” and
26 “Club” doctors and trainers are one and the same, and are in fact
27 the hired hands of the Clubs.

28 *Dent II*, 968 F.3d at 1131. Thus, because the “NFL doctors and trainers” allegedly acting in
violation of the drug laws were not NFL employees or agents at all, *Dent II* affirmed dismissal
of the negligence *per se* theory. *Id.* at 1132.

1 *Dent II* saved, however, the negligent voluntary undertaking theory. *Dent II* held that
2 plaintiffs had plausibly alleged the following elements of that claim:

3 (1) The defendant undertook to render services to another; (2) of a
4 kind the defendant should have recognized as necessary for the
5 protection of the plaintiff; (3) the defendant failed to exercise
6 reasonable care in the performance of the undertaking; (4) the
7 failure resulted in physical harm to the plaintiff; and (5) the
8 defendant's carelessness increased the risk of such harm.

9 *Id.* at 1132 (cleaned up).

10 *Dent II* articulated the content of the NFL's duty under that theory, in part, as follows:

- 11 • “[T]he NFL ‘voluntarily undertook a duty’ to ‘ensure
12 the proper recordkeeping, administration and
13 distribution of medications’” *Id.* at 1132.
- 14 • “[T]he NFL created a drug oversight program in 1973,
15 which ‘required teams and their doctors to report to the
16 NFL regarding the administration of medications.’”
17 *Ibid.*
- 18 • The NFL “‘audit[ed] clubs’ compliance with federal
19 drug laws,’ such as ‘the types of drugs being
20 administered, the amounts in which they were
21 administered,’ and related information.” *Id.* at 1132–
22 33.
- 23 • “[T]he NFL has ‘mandated procedures to control the
24 drug distribution system,’ including the registration of
25 the Clubs’ facilities as storage facilities for controlled
26 substances” *Id.* at 1133.
- 27 • “[T]he NFL undertook ‘the duty of overseeing the
28 administration’ of the distribution of pain medications
to players and is aware that it should be providing
protections.” *Id.* at 1134.
- Despite the NFL's one-step-removed relationship to the
players, it was within the NFL's control to promulgate
rules or guidelines that could improve safety for players
across the league. *Ibid.* (citing *Mayall*, 909 F.3d at
1068).

 Thus, to determine whether the NFL breached its duty “to ensure the proper
recordkeeping, administration and distribution of medications” by the clubs, a duty specifically
called out by the appellate opinion, and whether such a breach caused harm to a player, we
must by definition look at the actions *of the clubs* vis á vis the players and determine if those
club-level actions were “proper.”

1 At the hearing on the instant motion, the undersigned judge suggested that the necessity
 2 of such an approach presented an obstacle to class adjudication, given the likelihood that the 32
 3 different clubs (in 23 different jurisdictions) had significantly different medical practices over
 4 the 35-year period plaintiffs seek to certify. Plaintiffs' counsel responded that *Dent II*
 5 precluded consideration of the conduct of the clubs. Not so. Please consider each of the bullet
 6 items listed above that our court of appeals held supported a duty by the NFL. Those items
 7 necessarily turn in part on the propriety of conduct by the clubs.

8 As will be shown, the principal Rule 23 problem is that there is no set of common
 9 methods of proof on a class-wide basis.

10 **2. COMMON QUESTIONS OF LAW DO NOT PREDOMINATE.**

11 As stated, plaintiffs seek to bring a state common law negligence claim on behalf of a
 12 nationwide class of all NFL players who played at any time during the 35-year period from
 13 1973 to 2008 and who received any drugs from his team. Plaintiffs assert that New York
 14 negligence law should apply to the entire class, or, if New York law cannot be applied to the
 15 entire class, the law of the named plaintiffs' resident states, California, Arizona, and Illinois,
 16 should apply to the entire class (Br. at 29–30). (Recall that our court of appeals applied only
 17 California law.)

18 “A federal court sitting in diversity must look to the forum state’s choice of law rules to
 19 determine the controlling substantive law.” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d
 20 1180, 1187 (9th Cir. 2001).

21 California employs a three-step governmental interest analysis for choice-of-law
 22 problems:

23 First, the court determines whether the relevant law of each of the
 24 potentially affected jurisdictions with regard to the particular issue
 25 in question is the same or different. Second, if there is a
 26 difference, the court examines each jurisdiction’s interest in the
 27 application of its own law under the circumstances of the particular
 28 case to determine whether a true conflict exists. Third, if the court
 finds that there is a true conflict, it carefully evaluates and
 compares the nature and strength of the interest of each jurisdiction
 in the application of its own law to determine which state’s interest
 would be more impaired if its policy were subordinated to the
 policy of the other state and then ultimately applies the law of the

1 state whose interest would be more impaired if its law were not
2 applied.

3 *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 87–88 (2010) (cleaned up).

4 At the hearing on the instant motion, plaintiffs’ counsel misstated that plaintiffs’ briefing
5 had done a comprehensive survey of the law of all 50 states and shown that virtually all 50
6 states follow Section 323 of the Restatement (Second) of Torts in recognizing a claim for
7 negligent voluntary undertaking. Plaintiffs have produced no such comprehensive survey in
8 their briefs. At the hearing, plaintiffs’ counsel baldly asserted that “[e]very jurisdiction in the
9 United States has based its voluntary negligence law off of Restatement [(Second) of Torts
10 Sections] 323 and 324[A]” (Tr. 3:5–6). But plaintiffs’ briefing compared the law of only four
11 states: New York (where the NFL is headquartered), Arizona, California, and Illinois (where
12 named plaintiffs live). We “cannot rely merely on assurances of counsel that any problems
13 with predominance or superiority can be overcome.” *Zinser*, at 1189 (citation omitted). This
14 failure to analyze all possible jurisdictions, as required under the law of the forum state, is a
15 showstopper. Plaintiffs’ counsel has simply assumed away the problem and provided an
16 inadequate record for certification. The problem is that a proper adjudication of each player’s
17 claim may lead to application of the law of 23 different states. Plaintiffs’ brief offers no help
18 to find otherwise.

19 Under California’s choice-of-law rules, “a jurisdiction ordinarily has the predominant
20 interest in regulating conduct that occurs within its borders. . . .” *McCann*, 48 Cal. 4th at 97–
21 98 (cleaned up). “[A]lthough the law of the place of the wrong is not necessarily the
22 applicable law for all tort actions, the situs of the injury remains a relevant consideration.”
23 *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 168 (1978) (citation omitted). In
24 addition, however, the state where a plaintiff resides at the time of the lawsuit also generally
25 has an interest in providing its residents with a remedy, even when the wrong and the injury
26 occurred outside of the state. *McCann*, 48 Cal. 4th at 95; *Zinser*, 253 F.3d at 1187.

27 Look at a map of the United States. At least 23 states are implicated. The putative class
28 members include thousands of current and former NFL players spanning 35 years of play, 32

1 different teams, and medications administered and distributed (and injuries suffered) in at least
2 23 different states. According to plaintiffs (Br. at 34, 36):

3 The NFL’s voluntary undertaking of a duty to protect the
4 health and safety of its players League-wide, and its concomitant
5 breach of that duty by acting contrary to the health and safety of its
6 players, resulted in every Class member’s injuries in every
7 NFL-sanctioned stadium in the United States.

8 * * *

9 NFL players did not play, were not injured by the NFL’s
10 tortious conduct, and were not doled out massive amounts of
11 medications in any one particular state. As plaintiffs’ [third
12 amended complaint] makes clear, Plaintiffs — and all Class
13 members — were harmed in dozens of different cities during the
14 course of their NFL careers.

15 In other words, the potentially affected jurisdictions are (1) the states where class
16 members sustained injuries and (2) the states where they reside. “[T]he three-part California
17 choice of law inquiry requires comparison of each non-forum state’s law and interest with
18 California’s law and interest *separately*. As required by California law, [plaintiffs] thus must
19 apply California’s three-part conflict test to *each* non-forum state with an interest in the
20 application of its law.” *Zinser*, at 1188 (cleaned up).

21 Plaintiffs have cited a single decision granting certification of a state law claim on behalf
22 of a nationwide personal injury litigation class: *In re Copley Pharmaceutical, Inc.*, 158 F.R.D.
23 485 (D. Wyo. 1994) (Judge Clarence Addison Brimmer). In that multidistrict litigation, Judge
24 Brimmer certified a nationwide class of all persons in the United States “who suffered damages
25 as a result of the inhalation of Albuterol manufactured, supplied, distributed or placed in
26 commerce by Copley Pharmaceutical, Inc.” 158 F.R.D. at 493. Judge Brimmer certified the
27 class under Rules 23(b)(3) and 23(c)(4). Pursuant to Rule 23(c)(4), Judge Brimmer found that
28 while “individual questions predominate[d] as to the issues of causation and injury,” “common
issues predominate[d] the Plaintiffs’ claims for strict liability, negligence, [and] negligence per
se.” *Id.* at 492. Judge Brimmer found that trying the “common issues” of negligence and strict
products liability for the class before one jury, then trying the individualized questions of
causation and damages before separate juries, was “the most equitable approach.” *Ibid.*

1 *In re Copley Pharmaceuticals* is distinguishable because the district court’s order stated
2 that “the standard for ordinary negligence does not significantly differ throughout the country,
3 and the differences that do exist can be remedied through careful instructions to the jury.” *Id.*
4 at 491. Our court of appeals has recognized, however, that “the laws of negligence, products
5 liability, and medical monitoring all differ in some respects from state to state.” *Zinser*, 253
6 F.3d at 1188 (citation omitted).

7 Plaintiffs have not met their burden to show that a single body of law can be applied to
8 the entire class, or even that the differences among the states would be manageable. The Court
9 is concerned that trial of plaintiffs’ proposed nationwide negligence class implicating the law
10 of at least 23 different states would become a sprawling train-wreck. Variation in the law from
11 state to state might make the trial unmanageable. Perhaps the differences would prove
12 manageable. But plaintiffs have not met their burden to show it. “[N]o case law supports th[e]
13 unduly burdensome task” of requiring “the district court [to] *sua sponte* survey the law of all
14 fifty states.” *In re Hyundai and Kia Fuel Economy Litig.*, 926 F.3d 539, 562, n.6 (9th Cir.
15 2019). “The prospect of having to apply the separate laws of dozens of jurisdictions present[s]
16 a significant issue for trial manageability, weighing against a predominance finding.” *Id.* at
17 563.

18 **3. CLUB BY CLUB FACTUAL QUESTIONS PREDOMINATE AND NO**
19 **COMBINATION OF METHODS OF COMMON PROOF EXIST TO**
20 **PROVE THE NFL’S CLASS-WIDE LIABILITY.**

21 In the early 1970s, the NFL developed a formal annual prescription drug audit program
22 in “response to well-publicized dispensing of controlled substances from a few training rooms”
23 and “practices among some teams in the early 1970s which were contrary to the normal
24 prescribing of controlled substances” (Dkt. No. 169-7 at 61, 201). The head of the prescription
25 drug audit program held the title NFL Drug Advisor. Dr. Forest S. Tennant, MD, took over as
26 NFL Drug Advisor in 1986. That year, Dr. Tennant wrote to the team physicians and head
trainers describing the purpose of the program:

27 The Annual Prescription Audit is primarily designed to insure that
28 controlled substances which are by definition, abusable, are stored,
prescribed, and recorded in appropriate documents as is normally

1 done in regular medical and pharmaceutical practice. The Annual
 2 Prescription Drug Audit is not intended to dictate the practice of
 3 medicine or to unnecessarily limit prescribing options but to
 4 minimize abuse, diversion, and to present a sound image of quality
 5 record-keeping and pharmaceutical practice.

6 Dr. Tennant described the double-check audit system utilized by the program:

7 The League utilizes a double-check audit system, headed by Mr.
 8 Charles Jackson of NFL Security, to prevent diversion of
 9 controlled (abusable) substances. One check is an on-site audit
 10 conducted in NFL training rooms by our security representatives.
 11 This mechanism gives us the opportunity to determine, first-hand,
 12 if any performance-enhancing drugs such as anabolic steroids or
 13 amphetamines are being dispensed. Also, controlled substances
 14 are actually counted to determine if inventory matches written
 15 records. The second check is done by having each team submit
 16 their inventory records relative to controlled substances. Proper
 17 record-keeping should provide an audit trail which shows the
 18 quantity of controlled substances which are purchased and
 19 dispensed.

20 For purposes of class certification, there are four important takeaways from the
 21 prescription drug audits. *First*, the prescription drug audits showed substantial variation
 22 among the teams both in terms of recordkeeping and administration. For example, the 1990
 23 report stated that “[a]udit trails by use of the dispensing-prescribing log and internal audit
 24 summary are well done by some Clubs and essentially absent in others” (*id.* at 209). The
 25 report went on (*ibid.*):

26 Some Clubs don’t seem to know which drugs are controlled
 27 substances, and some don’t apparently understand the necessity
 28 (and law) to keep dispensing logs and an internal audit. A review
 of Club logs and internal audits . . . reveal excellent tracking by
 some . . . and some other Clubs do not have enough documentation
 to know if controlled substances are accounted for.

Importantly, the variations among the clubs in terms of recordkeeping affect not only the
 lack of common proof, but also the *substantive* liability of the NFL. Recall that the NFL’s
 voluntary duty is, in part, to “ensure the proper *recordkeeping*, administration and distribution
 of medications” by the clubs. *Dent II*, 968 F.3d at 1132 (emphasis added). So, if a club
 maintained good drug records, the NFL did not breach its duty to players of that club, while
 players of a club who negligently maintained drug records might have claims. And, again, for
 players of clubs that failed to maintain proper drug records, we won’t have a method of
 common proof to show that such failure *caused* injury to the player, given the lack of records.

1 The 1992 report stated: “The range of non-steroidal anti-inflammatory drugs (NSAIDs)
2 and controlled substances used in the NFL is quite wide.” For example, in 1986, the maximum
3 number of distinct types of controlled substances dispensed by a team was 15. In 2004, the 32
4 teams averaged seven different types of NSAIDs and seven different types of controlled
5 substances per team. In 2012, the average was 9.3 different kinds of NSAIDs and 13.6
6 different kinds of controlled medications per club. The 2014 audit report confirmed that the
7 variation in drug utilization among the clubs did not diminish over time, reporting “substantial
8 variation exists in reported prescribing behaviors of NSAIDs and controlled medications” (Dkt
9 No. 169-8 at 20; Dkt. No. 169-7 at 7, 59, 64, 70 108).

10 The audit reports showed that not only did the teams dispense a wide variety of NSAIDs
11 and controlled substances but dispensed the same drugs at significantly different volumes. For
12 example, in the 2005 regular season (July 2005–January 2006), the New York Jets dispensed
13 320 tablets of Toradol and 148 Toradol injections. By contrast, the previous season, the
14 Indianapolis colts dispensed more than twice as many (651) doses of Toradol tablets and more
15 than 1.5 times (249) as many Toradol injections (Dkt. No. 169-7 at 105, 111).

16 Plaintiffs would have us wave our hand at these inter-team differences as merely a
17 question of damages, not liability because, they say, the volumes were all unreasonable. At
18 oral argument, plaintiffs’ counsel brazenly compared the differences in volumes of medications
19 dispensed by the NFL teams to the difference in number of victims between “a serial killer
20 who killed 20 people and a murderer who committed one[.] I guess I could say the murderer
21 who committed one, you know, is better than the one who committed 20, but they’re all
22 murderers” (Tr. 28:11–18). But this dogma cannot be presumed as a given. Plaintiffs have
23 provided no reason or evidence, other than exaggerated rhetoric, to believe that the least
24 volume of medications was equally unreasonable to the most and that such differences are
25 immaterial. Moreover, plaintiffs have made no showing whatsoever that the wide variety of
26 painkillers and non-steroidal anti-inflammatory drugs (NSAIDs) posed a uniform risk in terms
27 of excessive use. The inter-team differences in terms of volumes and varieties of drugs cannot
28 be ignored.

1 *Second*, the few team-specific (as opposed to league-wide) audit results provided by
2 plaintiffs show substantial variation over time even *within one team*. Again, to take the New
3 York Jets as an example, in the 2006 regular season, the Jets dispensed 511 doses of Vicodin
4 tablets. But the following year, the Jets dispensed 1275 doses of the same drug. Again,
5 plaintiffs have provided no reason to believe that such differences are a matter of damages only
6 rather than liability versus non-liability.

7 *Third*, the prescription drug audits did not (and could not) provide a uniform standard of
8 medical care for the team physicians trainers. The 1986 report emphasized that it did not
9 “dictate how physicians should practice medicine. The practice of medicine is an art and
10 science that is based upon a physician’s experience, training, patient’s needs, and local
11 standards, to name a few factors” and is controlled by state law of the place of the practicing
12 physician (Dkt. No. 169-7 at 63). The NFL made the point again in the 1992 report (Dkt. No.
13 169-8 at 20):

14 It is crucial to point-out that this program is not designed to
15 comprehensively examine the prescribing behaviors of NFL
16 physicians, the drug dispensing/administering behaviors of athletic
17 trainers, or whether there existed the appropriate clinical diagnoses
18 justifying the prescribing, dispensing, or administration of these
19 drugs.

20 To determine whether the NFL breached its duty to ensure the proper recordkeeping,
21 administration and distribution of medications by the clubs, we will need to look at the
22 reasonableness of the conduct of the club physicians and trainers in that regard, which is in
23 turn governed by state law of the place of the practicing professionals. Plaintiffs have given us
24 no record whatsoever to evaluate these differences.

25 *Fourth*, the NFL has frequently modified the audit program itself over time in response to
26 changing circumstances within the league. For example, in 1987, the NFL began auditing only
27 controlled substances; prescription drugs that were not controlled substances were no longer
28 subject to the audits. Also in 1987, the NFL recommended standard dispensing log and
internal audit forms for controlled substances to the teams; prior to 1987, “there was no
standardization in the League, and controlled substances were, therefore, difficult to control

1 and audit.” In 1992, “[u]nlike previous years, NSAIDs were included along with controlled
2 substances as the focus of the audits. . . . [T]he inclusion of the NSAIDs was based upon the
3 significant utilization of these agents in organized sports and the great potential for deleterious
4 consequences with high dosages or prolonged use.” Later on, the prescription drug audit
5 program mandated that the clubs use an electronic recordkeeping system (Dkt. No. 169-7 at
6 207–09; Dkt. No. 169-8 at 22).

7 Plaintiffs allege that by voluntarily undertaking the prescription drug audit program, the
8 NFL assumed a duty to conduct the audits with reasonable care for the benefit of the players.
9 Whether the NFL did so will turn in large part on the drug recordkeeping, administration and
10 distribution practices of the teams and how the NFL conducted the audits in response. But
11 those factors have changed significantly over the 35-year period from 1973–2008.

12 Finally, plaintiffs have attached to their motion a report published in 2011 of a telephonic
13 survey of 644 retired NFL players who retired between 1979 and 2006 (the proposed class
14 period is players who played between 1973–2008). Linda B. Cottler et al., *Injury, Pain, and*
15 *Prescription Opioid Use Among Former National Football League (NFL) Players*, 116 *Drug*
16 *and Alcohol Dependence* 188–194 (2011). To assess any correlation between injuries and
17 opioid use in the NFL, and opioid misuse after retirement, interviewers asked the retired
18 players about opioid use or misuse during their NFL careers; sources of opioids; concussions;
19 other injuries; frequency and severity of injuries; and post-retirement use or misuse of opioids.
20 *Id.* at 189.*

21 Important for our purposes, 48% of the retired players reported using no prescription
22 opioids during their NFL careers. *Id.* at 189–90. The study further found that those who did
23
24

25 * “Professional interviewers utilized a standard oral script to contact potential study participants by telephone
26 to explain the purpose of the study and obtain verbal consent. No incentives were provided for participation in the 20
27 minute survey. Study protocols were approved by the Human Research Protection Office at the Washington
28 University School of Medicine. [¶] The *Survey of Retired NFL Football Players* is a 62-item assessment, developed
for a telephone interview format and vigorously pre-tested among NFL players who were not part of the sample pool.”
Ibid.

1 use prescription opioids in the NFL (52% of those surveyed) reported obtaining them from
2 different sources:

3 37% obtained their opioids exclusively from a doctor, 12% got
4 them exclusively from a non-medical source, and *the remaining*
5 *majority (51%), reported the source of their prescription opioids to*
be a combination of both doctors and illicit sources such as a
teammate, coach, athletic trainer, or family member.

6 *Id.* at 190 (emphases added).

7 Although the survey respondents may not be perfectly representative of the putative class
8 as a whole, they do overlap completely, *i.e.*, all of the 644 survey respondents are putative
9 class members. And, although plaintiffs do not allege injuries based solely on opioids (they
10 also allege injuries from NSAIDs), their allegations rest heavily on injuries stemming from
11 opioids. Therefore, the Cottler study is significant because it shows that a significant number
12 of putative class members received opioids from sources other than their clubs. Even
13 plaintiffs' counsel do not contend that the NFL undertook to regulate the acquisition of pain
14 killers by players from sources other than clubs. Yet this factor would have to be accounted
15 for. But there is no practical way to do so on a class-wide basis.

16 For the foregoing reasons, a Rule 23(b)(3) class will not be certified.

17 **4. CLASS MEMBERS CLAIM LARGE DAMAGES.**

18 Rule 23(b)(3)(A) provides that one of the factors relevant to determining whether a class
19 action is superior is "the class members' interests in individually controlling the prosecution or
20 defense of separate actions." "Where damages suffered by each putative class member are not
21 large, this factor weighs in favor of certifying a class action." *Zinser*, 253 F.3d at 1190. In
22 contrast, where putative class members claim relatively large damages, this factor weighs
23 against class action. *Ibid.*

24 Here, several putative class members claim damages greater than two million dollars
25 (Dkt. No. 174-4 at 45). Moreover, plaintiffs represent that more than 1,800 putative class
26 members have signed retainer agreements with plaintiffs' counsel (Br. at 34). These facts
27 show that individual class members have substantial incentive to pursue individual claims
28 weighing against the superiority of a class action.

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5. A RULE 23(c)(4) CLASS.

Plaintiffs argue that this case is appropriate for certification of an “issue class” under Rule 23(c)(4), which states: “When appropriate, an action may be brought or maintained as a class action with respect to particular issues.”

Plaintiffs argue that certification of the duty and breach elements of the negligence claim are “issues” within the meaning of Rule 23(c)(4) such that whether (1) the NFL voluntarily assumed a duty to the class and (2) the NFL breached that duty, can be tried on a class-wide basis. Then, plaintiffs argue, assuming the class prevails on the first two elements, individual class members can bring actions against the NFL in state courts across the country to prove that the NFL’s class-wide breach proximately caused their injuries and to prove damages.

“[T]he theory of Rule 23(c)(4)[] is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis may be secured even though other issues in the case may need to be litigated separately by each class member.” 7AA WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1790 (3d ed. 2021).

In order to be approved, class-wide adjudication of the common issues isolated under Rule 23(c)(4) must still achieve judicial economy *as to the action as a whole*. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 856 (9th Cir. 1982); 1 MCLAUGHLIN ON CLASS ACTIONS § 4:43 (17th ed. 2020); WRIGHT & MILLER, *supra*.

Here, certification under Rule 23(c)(4) is not appropriate. If we were to certify a Rule 23(c)(4) class to evaluate the conduct of the NFL itself, we would still need to have evidence concerning what the NFL itself knew about the extent of problems, if any, at the club level. Consider the element of the tort, namely that the defendant should have recognized the service as necessary for the protection of the plaintiff. In evaluating what the NFL “should have recognized” as “necessary for the protection of the plaintiffs,” it will be essential to prove the extent of knowledge by the NFL of specific club level safeguards. As plaintiffs say, and the NFL should have known it, then the NFL should have recognized the need. But if the NFL believed the safeguards were adequate as to some teams (or all teams), there would not be

1 liability. A club by club probing of the NFL's knowledge would still devolve into a myriad set
2 of club by club issues.

3 Furthermore, if a verdict in favor of a Rule 23(c)(4) class were rendered, then the state
4 courts would have a devil of a time trying to dovetail that finding into the specifics of follow-
5 up trials by individual players in state court (the procedure proposed by plaintiffs).

6 The most effective and efficient way to litigate this case is to proceed to trial on a non-
7 class basis. It is expected that some of the verdicts rendered by the jury in favor of plaintiffs
8 would have collateral estoppel effect that would benefit their teammates. And, in the event of
9 loss by plaintiffs, it would not prejudice other class members suing on their own.

10 The decisions referred to by plaintiffs do not support their position. Plaintiffs refer
11 repeatedly to *Martin v. Behr Dayton Thermal Products LLC*, 896 F.3d 405 (6th Cir. 2018).
12 There, the Sixth Circuit affirmed certification of a class of owners of some 540 Ohio
13 residential properties who alleged that the defendant automotive and dry-cleaning businesses
14 had negligently allowed toxic substances to be released from their facilities into the
15 groundwater underlying the class members' properties. The class members asserted claims for
16 diminution in property values and loss of use and enjoyment; they did not assert damages for
17 personal injuries.

18 The district court certified several common issues relating to the defendants' breach, *e.g.*,
19 "[w]hether or not it was foreseeable to [the defendants] that their improper handling and
20 disposal of [the toxins] could cause" the groundwater plumes. *Id.* at 410. The district court did
21 not certify the claims as a whole because the issues of fact-of-injury, proximate causation, and
22 extent of damage would require individualized inquiries. *Ibid.* The Sixth Circuit affirmed,
23 finding that while common issues did not predominate as to the case as a whole, common
24 issues did predominate within the issues certified and trying the certified issues on a common
25 basis was superior because it would materially advance the litigation and because the
26 properties at issue were "in a low-income neighborhood, meaning that class members might
27 not otherwise be able to pursue their claims." *Id.* at 416.

